

# Transposition Of The Digital Content Directive (EU) 2019/770 Into Estonian Legal System

by Irene Kull\*

**Abstract:** Digital Content Directive (EU) 2018/770 (DCD) is an innovative directive insofar as contracts for the supply of digital content and digital services were not regulated by EU law and like in most European countries, this area was not regulated in Estonia either. Member States extend the scope of the material regimes concerned. That includes the case of dual-purpose contracts and of platform providers who are not direct contractual partners of the consumer. Member States are also free to provide for longer time limits for the liability of the trader than those laid down in the Directives. The qualification and the categorisation of digital content and service contract also remain unsolved. The draft law for the transposition of the Digital Content Directive has not yet been submitted to the Estonian Parliament. The Ministry of Justice of Estonia has prepared a draft law concerning transposition of the DCD, Sale of Goods Directive and recently adopted the Modernization Directive which is not publicly available. The article briefly describes the process of transposition

of the DCD and the place of digital content and digital service as concepts in the Estonian private law system, as well as legislative choices made during preparation of the draft. The most reasonable option is to transpose relevant provisions of DCD into general part of LOA which is consistent with current transposition practices. The author also discusses the possibility of extending the scope of application of the DCD. Contracts where consumers provide or undertake to provide personal data to the trader are contracts for payment under Estonian law. Despite the possibility that general rules on termination of contract apply, the need to regulate consequences for withdrawal of consent by specific rules is examined in the article. Currently, Estonian draft law provides a time limit for trader's liability and limitation periods. The author analyses the existing system of traders' liability and possible consequences if only the limitation period will be kept. Finally, the author provides some concluding remarks.

**Keywords:** Directive (EU) 2019/770; Digital Content and Service; Transposition; System of Estonian Private Law; Personal Data as Consideration; Traders Liability

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## A. Introduction

1 The Digital Content Directive (EU) 2019/770 (hereafter also: DCD)<sup>1</sup> has been published on May 22, 2019, entered into force on June 11, 2019 and

must be transposed into national law on July 1, 2021 at the latest. The objective of the DCD is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection and lay down common rules on certain requirements concerning contracts between traders

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1 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

and consumers for the supply of digital content or digital services.<sup>2</sup>

- 2 Transposition of the Digital Content Directive into Estonian law touches upon the parallel transposition of the Sale of Goods Directive<sup>3</sup> and Modernization Directive<sup>4</sup>. The DCD and Sale of Goods Directive should complement each other by establishing certain requirements concerning contracts for the supply of digital content or digital services, and certain requirements concerning contracts for the sale of goods. However, the directives do not overlap in their objective scope of application. The DCD should also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content.<sup>5</sup> The Sale of Goods Directive governs the sale of goods (online or offline), including goods embedded with digital components (e.g., smart watches, smart TVs, etc.). Both directives provide for conformity requirements (e.g., quality, interoperability, updates, accessories, fit for purposes, etc.), remedies for lack of conformity (e.g., repair, replacement, price reduction, termination, etc.), a 2-year time limit of traders' liability for defects, rules regarding the burden of proof, and redress. The DCD is an innovative directive insofar as contracts for the supply of digital content and digital services were not regulated by EU law and like in most European countries, this area was not regulated in Estonia either. The Directive is of maximum harmonisation, unless otherwise provided for<sup>6</sup> which means that Member States may not restrict the scope of the directives. They may, however, freely<sup>7</sup> extend the scope of the material regimes concerned which

includes the case of dual-purpose contracts<sup>8</sup> and of platform providers who are not direct contractual partners of the consumer<sup>9</sup>. Member States are also free to provide for longer time limits for the liability of the trader than those laid down in the Directives<sup>10</sup>. The qualification and the categorisation of digital content and service contract also remain unsolved.

- 3 This article focuses on some main decisions and choices made in the course of discussions concerning the transposition of the DCD. The article contains a short introduction to the process for transposition of the DCD and the place of digital content and digital services as concepts in Estonian private law system and in the system of legislation. Furthermore, it discusses some choices made in the course of preparation of the transposition such as an extension of the scope of application, personal data as consideration, and a period for liability. It closes with concluding remarks. Main source is draft of the Law amending the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives) which was published on 9.04.2021.<sup>11</sup>

## B. Process of the transposition of the Digital Content Directive

- 4 The Ministry of Justice of Estonia has prepared a draft law concerning transposition of the DCD, Sale of Goods Directive and recently adopted Modernization Directive. During the preparation of the draft law, interest groups were invited to comment on a selection of key issues related to the transposition of the directives that the Ministry considered important. Responses were received from the Ministry of Economic Affairs and Communications, the University of Tartu, the Estonian Bar Association,

2 See Art. 1 of the DCD.

3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

4 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.

5 Recital 20 of the DCD.

6 Art. 4 of the DCD.

7 Recital 16 of the DCD.

8 Recital 17 of the DCD.

9 Recital 18 of the DCD.

10 Art. 11(2) and (3) and Recitals 56 and 58 of the DCD.

11 Võlaõigusseaduse ja tarbijakaitseaduse muutmise seaduse (digitaalse sisu, tarbijalemüügi ning muudetud tarbija õiguste direktiivide ülevõtmine) [Law amending the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives)], no 21-0443. Available in Estonian at: <<https://eelnoud.valitsus.ee/main/mount/docList/f4fd9c56-c713-4200-a85a-0e024a6fc9b2#I02DIqIf>> Hereby I would like to thank K. Koll from Ministry of Justice who kindly equipped me with the non-published pre-draft and other materials used in the process of preparation.

the Estonian Chamber of Commerce and Industry, the Estonian Association of Information Technology and Telecommunications and the Consumer Protection and Technical Regulatory Authority.<sup>12</sup> The issues from the questionnaire were the personal scope of both directives, the need to regulate dual purpose consumer contracts, exclusions in the scope of application, right to use personal data as counter-performance, regulation of consequences of withdrawal of consent to use of personal data, consequences of termination of package contracts, non-compliance, the seller's liability and limitation period, the regulation of the burden of proof and the obligation to provide information, the regulation of returns and refunds, and finally, the sales guarantees and harmonization of provisions of the sales contract with provisions of the contract for work. To date, there has been no public discussions concerning transposition of the directives. However, analyses of the most important problems related to the transposition of the Directives into Estonian law have been published.<sup>13</sup> At the moment when this article was written, the draft law from 23.03.2021 on the transposition of the directives was sent to ministries and interest groups for an opinion and will be submitted to the Estonian Parliament in the near future.<sup>14</sup>

### C. Digital content and digital services in the system of Estonian private law

5 One of the main challenges when transposing the Digital Content Directive and also the Sale of Goods Directive is to ensure the coherence of the existing private law system. Estonian legislative practice has followed, so far, the principle of coherency quite successfully. The Estonian legal system was fully revised in the 1990s and in many cases, Germanic family of law was chosen as model for the new laws.<sup>15</sup> In private law this entailed drafting the 'imaginary' civil code based on the pandect system consisting of the General Part of Civil Law Act (hereinafter: GPCCA)<sup>16</sup>, Property Law Act, Family Law Act, Law of Succession Act, and Law of Obligations Act<sup>17</sup> (hereinafter: LOA).<sup>18</sup> It was decided from the beginning of legal reforms started in 1991 that there is no urgent need to codify the above private law acts that already function *de facto* as a single code.<sup>19</sup> Notably, the Estonian legal system developed under the influences of other legal systems and

12 The author also used the questionnaire with answers from interest groups provided by the Ministry of Justice when writing this article.

13 For example, an overview of the Directive's regulation of conformity and liability of the seller and legal remedies and an analysis of what extent the transposition of the Directive means new principles for Estonian contract law by K. Sein in 'Tarbija õiguskaitsevahendid uues digisisu ja digiteenuste lepingute direktiivis' (Legal Remedies of the Consumer in the New Directive concerning Contracts for Digital Content and Digital Services) (2019) 8 *Juridica* 568-577 (in Estonian); K. Urgas, K. Koll, 'Nõuetele vastavus ning ettevõtja vastutus uues digitaalse sisu ja teenuste lepingute direktiivis' (Conformity and Liability of Businesses in the new Directive concerning Digital Content and Digital Services) (2019) 8 *Juridica* 551-567 (in Estonian). About personal data as counter performance by I. Kull, 'Digisisu üleandmine ja digiteenuste osutamine isikuandmete esitamise vastu. Euroopa Parlamendi ja nõukogu direktiiv (EL) 2019/770' (Supply of Digital Content and Digital Services in Return for Providing Personal Data. Directive (EU) 2019/770 of the European Parliament and of the Council), (2019) 8 *Juridica* 578-588; I. Kull, 'Withdrawal from the consent to process personal data provided as counter-performance: contractual consequences', (2020) 13 *Juridiskā zinātne/Law* 33-49.

14 Passing the Act requires three readings in Riigikogu (Estonian Parliament). See Riigikogu kodu- ja töökorra seadus (Riigikogu Rules of Procedure and Internal Rules Act), entry into force 17.03.2003, available at: <<https://www.riigiteataja.ee/en/eli/518112014003/consolide>>.

15 In private law the Germanic family was chosen as main source of guiding principles on the bases of decision made in 1992 by the Supreme Council of the Republic of Estonia. Eesti Vabariigi Ülemnõukogu otsus 6. juulil 1992 Eesti Vabariigi pankrotiseaduse rakendamise kohta (Decision of the Supreme Council of the Republic of Estonia of 6 July 1992 concerning the Implementation of the Republic of Estonia Bankruptcy Act) § 7 (7) – Riigi Teataja (the State Gazette) 1992, 31, 404. See P. Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' (2000) *Juridica International* 5, 107; The draft of the LOA was largely modelled on the German Civil Code (BGB) and particularly the draft proposing modification to the BGB (BGB-KE). See Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts. Herausg vom Bundesminister der Justiz. (1992) Köln, Bundesanzeiger. See also I. Kull, 'Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law' (2008) *Juridica International* 14, 122-129.

16 General Part of the Civil Code Act (tsiviilseadustiku üldosa seadus), in force from 1.07.2002, available at: <<https://www.riigiteataja.ee/en/eli/509012018002/consolide>>.

17 Law of Obligations Act (võlaõigusseadus), in force from 1.07.2002, available at: <<https://www.riigiteataja.ee/en/eli/508082018001/consolide>>.

18 Varul (n 15), 108.

19 Varul (n 15), 118. See also M. Ristikivi, A. Kangur, I. Kull, K. Luhamaa, M. Sedman, H. Siimets-Gross and A. Värvi 'An Introduction to Estonian Legal Culture' in S. Koch and J. Øyrehagen Sunde (eds), *Comparing Legal Cultures* (Bergen, Fagbokforlaget, 2nd ed), 191-220.

harmonised soft law instruments.<sup>20</sup> Therefore, it is understandable that Estonia has reason to monitor the transposition of directives in the model countries, taking into account its own established legal system and case law.

6 The DCD, Sale of Goods Directive and Modernization Directive to be transposed fall within the scope of regulation of LOA and partly also of the GPCCA. The LOA consists of two parts – general (§§ 1-207) and special (§§ 208-1068) – of which the latter is in turn divided into two parts, the first governing specific types of contract (§§ 208-1004) and the second non-contractual obligations such as tort liability for damage, unfair enrichment, administration without mandate and public permission of remuneration (§§ 1005-1068). In this context, it should be noted that when drafting the LOA, it was considered important to consolidate all the rules on consumer contracts into LOA in order to ensure regulatory uniformity. Thus, all EU consumer rights directives governing contractual relations are placed in the structure of the LOA, taking into account whether these are general rules applicable to all types of contract or rules applicable only to a specific type of contract.<sup>21</sup> The preparation of the transposition is based on an already established principle that contract law provisions of the directives will be transposed into the LOA, taking into account whether these

are general or special rules. In addition, general provisions of the GPCCA, especially rules on prescription periods, have to be considered. Indeed, Estonia has also adapted the Consumer Protection Act<sup>22</sup>, however it consists mainly in public law rules.

7 One of the biggest challenges of the DCD is that the Directive does not regulate the legal nature of contracts for the supply of digital content or digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental or *sui generis* contract, are left to national law.<sup>23</sup> Regulation, regardless of different types of contractual agreements (e.g. sales or service contracts), is reasonable as it prevents Directive from being outpaced by technological development, innovation and evolution of new business models.<sup>24</sup> However, this also causes difficulties for Member States in choosing the best legislative technique.<sup>25</sup> At the time of writing this article, the draft law governing amendments to the sales contract and other special types of contracts was not yet ready, therefore, I will not go into more detail on the links between the transposition of the DCD and the transposition of the Sale of Goods Directive. Still, it is important to note that the rules of current law are also applicable to digital content and digital services, although digital content or services are not explicitly mentioned in law or regulated by specific rules. For example, according to the § 48 of the GPCCA objects of the right can be things, rights, and other benefits, which means among other objects also digital content or digital services. Also, the definition of sales contracts leaves the list of objects of the contract open, providing that the provisions concerning the sale of things applies to the sale of rights and other objects, unless otherwise provided for in the law (§ 208(3) LOA). However, this does mean that provisions concerning consumer sale apply to contracts for digital supply and in some cases digital services. The definition for such

20 For example, in drafting the LOA, the countries whose examples were used were the Netherlands, Denmark, France, Italy, the state of Louisiana, the province of Quebec, and other countries of the Romanistic and Germanic family, as well as Nordic countries. The LOA has also been greatly influenced by the model laws like Unidroit PICC and PECL. The Civil Chamber of the Estonian Supreme Court has stated in several judgments that foreign legal acts, court practice, and legal doctrines can be taken into account when interpreting Estonian law. This requires, however, that there is no Estonian case law and that the rules or legal system of the model country are similar to those in Estonia. See judgments of the Supreme Court of Estonia from 21.12.2004 no. 3-2-1-145-04 and from 13.09.2005 no. 3-2-1-72-05, from 09.12.2008 no. 3-2-1-103-08 and from 12.10.2011 no. 3-2-1-90-11. The Criminal Chamber of the Estonian Supreme Court, on the other hand, warned judges against uncritical referencing of foreign law. Whereas the similarity of Estonian law to German law does not legitimize abstaining from the principle that, in Estonia, the state power including judicial power is exercised solely on the bases of the Constitution and the laws of Estonia. See order of the Criminal Chamber of the Supreme Court of Estonia from 13.06.2018 no. 1-17-11509.

21 For example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 was implemented into the general part of LOA; provisions implementing the Consumer Rights Directive 2011/83/EU into special part under contract of sale rules.

22 Consumer Protection Act (tarbijakaitseadus), in force from 01.03.2016, available at: <<https://www.riigiteataja.ee/en/eli/ee/504122020003/consolide/current>>.

23 Recital 12 of the DCD.

24 K. Sein and G. Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) *European Review of Contract Law* 15(3), 260.

25 See for example discussion by G. Spindler, 'Contracts for the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content' (2016) *ERCL* 12(3), 183–217.

provisions is a contract where a consumer is sold a moveable by a seller who enters the contract in the course of their economic or professional activities.<sup>26</sup>

- 8 Taking into account the existing system of Estonian private law, it is evident, that general rules concerning digital content and services cannot be smoothly integrated into the special part of the LOA, which is structured according to type of contract. There were a number of options for transposition of the DCD under discussion: for example, whether to make changes in the rules of all types of contracts or only amendments in the regulation of sales contracts and add references to the relevant provisions concerning digital content and services to other types of contracts; amend sales, lease and agency contracts and, in the case of other types of agreements; add references to general rules only within the framework of a specific part; create completely separate new type of contract; adapt separate law or make changes in the general part of the LOA. The most reasonable and consistent with transposition traditions already established in previous practice was the option to transpose relevant provisions of the DCD into general part of the LOA.
- 9 Draft law prepared by the Ministry of Justice proposes to amend Chapter 2 of Part 1 of the General Part of the LOA<sup>27</sup> with the Division 6 named as 'Digital Content and Digital Service Contract'. According to the draft, the new division will consist of following provisions: definition of the digital content and digital service

contract (§ 62<sup>4</sup>), application of provisions of general part of LOA (§ 62<sup>5</sup>), supply of digital content or digital service (§ 62<sup>6</sup>), conformity of the digital content or digital service (§ 62<sup>7</sup>), obligation to update the digital content or digital service (§ 62<sup>8</sup>), incorrect integration of the digital content or digital service (§ 62<sup>9</sup>), deviating agreements (§ 62<sup>10</sup>), liability of the trader for non-conformity (§ 62<sup>11</sup>), burden of proof (§ 62<sup>12</sup>), consumer's right to terminate the contract for failure to supply (§ 62<sup>13</sup>), consumers remedies for lack of conformity (§ 62<sup>14</sup>), obligations of the trader in the event of termination (§ 62<sup>15</sup>), obligations of the consumer in the event of termination (§ 62<sup>16</sup>), time limits and means of reimbursement by the trader (§ 62<sup>17</sup>), the contractual consequences of the withdrawal of the consumer's consent to the processing of personal data (§ 62<sup>18</sup>), modification of the digital content or digital service (§ 62<sup>19</sup>), right of redress (§ 62<sup>20</sup>), prohibition on violation of provisions (§ 62<sup>21</sup>) and mandatory nature of provisions (§ 62<sup>22</sup>).<sup>28</sup> In order to clarify the relationship between the provisions of general and special parts, § 62<sup>5</sup>(7) of the LOA will provide that the provisions of the general part of the LOA and provisions of the respective type of contract to which the contract of supply of digital content or digital services conforms shall apply, unless otherwise regulated in Division 6. Digital content, digital service, digital element thing and related concepts are defined in the new § 14<sup>2</sup> of the LOA.

## D. Some choices concerning transposition of the DCD

### I. Scope of application of the rules transposed from the DCD

- 10 According to recital 16 of the DCD, Member States are free to extend the application of the rules of the Directive to contracts that are excluded from the scope of the Directive, for example to natural or legal persons that are not consumers within the meaning of the Directive. According to the Art. 3(1) of the DCD, the Digital Content Directive applies only if a trader provides or undertakes to provide digital content to a consumer. A consumer is 'any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession' (Art. 2(6) of the DCD). A similar definition can be found in the § 1(5) of the LOA which provides that for the purposes of the LOA, a consumer is a natural person who concludes a transaction not related to independent

26 In the Commentary to the § 48 of the GPCCA from 2010 digital content or digital services are not mentioned as objects of rights. See P. Varul, I. Kull, V. Kõve and M. Käerdi, 'Tsiiviilseadustiku üldosa seadus. Kommenteeritud väljaanne' (Juura 2010), 190-191. In the commentary to the § 208(3) of the LOA from 2019 the reference to the possibility that provisions of sales contract will apply also to the digital content and services also on the bases of § 48 of the GPCCA is made. In the commentaries to the § 208(4) of the LOA it is explained, that in addition, sales contracts entered into in respect of digital products, such as computer software, electronic databases, digitized music, video and text, etc., shall also be deemed to be contracts for the sale of movables within the meaning of § 208(4). It does not matter whether the product in question is delivered to the consumer in physical form, eg on a durable medium (CD, DVD, etc.) or whether it allows the user to download it from a certain account or to a certain device. See M. Käerdi, '§ 48' in: P. Varul, I. Kull, V. Kõve, M. Käerdi and K. Sein (eds), *Võlaõigusseadus II. Kommenteeritud väljaanne* (Juura, 2019), 41-42.

27 Structure of the Part 1 of the LOA is following: Chapter 1 General Provisions. Chapter 2 Contract. Division 1 General Provisions; Division 2 Standard Terms; Division 3 Off-premises Contract; Division 4 Distance Contracts; Division 5 Contracts Entered into through Computer Network.

28 The provisions contained in the draft law may change during the preparatory discussions.

economic or professional activities. Until now, the Estonian legislature applied the rules concerning consumer contracts only to contracts between a trader and a consumer. The concept of consumer has not been extended in Estonian case law either. It is questionable, if there is any need to extend the personal scope of either directive to companies or the non-profit sector. So far, in practice, there has been no need to restrict the freedom of contract to such an extent. Furthermore, the provisions on the unfair standard terms of the LOA (§§ 35-45) apply to contracts concluded between businesses which should exclude the risk of abuse of rights. On the other hand, the extension of the application to other subjects than consumers and businesses would increase the administrative burden and obligations of businesses and legal uncertainty<sup>29</sup>.

- 11 Member States should also remain free to determine, in the case of dual-purpose contracts, where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered a consumer. It has to be mentioned that already according to recital 17 of the Consumer Rights Directive<sup>30</sup> such dual-purpose contracts are always contracts concluded with the consumer. This principle has been used as a basis for transposing the Consumer Rights Directive into Estonian law. Providing for differences in the transposition of the DCD could mean that consumer protection rules have to be applied only in part to the same contractual relationship. It is sensible to extend the scope of application to dual purpose contracts while in the case of digital content and digital service, there are often situations where the digital content or service is also used to some extent for economic and professional activities. Although the draft law does not contain any corresponding provision, according to the explanatory memorandum of the draft law, the definition of consumer will cover also persons who conclude dual purpose contracts, e.g., where the contract is concluded for purposes that are partly within and partly outside the person's trade.

## II. Personal data of the consumer as form of payment

- 12 It is novel that the scope of the DCD is not only contracts for which the consumer pays with money, but also contracts in which the consumer provides his or her personal data to the trader. According to the Art. 3(1), the Directive "shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose." Recital 25 of the DCD provides that the Directive does not apply to situations where the trader only collects metadata, such as information concerning the consumer's device or browsing history, except where this situation is considered to be a contract under national law. Member States should remain free to extend the application of this Directive to such situations, or to otherwise regulate such situations, which are excluded from the scope of this Directive. At the moment, it is decided that Estonia will not use this possibility. However, the inclusion of so-called cookies should be seriously considered, especially taking into account judgment of the European Court of Justice C-673/17 according to which if cookies are used, the active consent of the consumer is needed for the storage of information or access to information already stored in a website user's terminal equipment.<sup>31</sup> This raises the question of why personal data obtained through cookies and processed with consent should be excluded from the scope, while other personal data processed with consent would lead to the application of the Directive.<sup>32</sup>
- 13 Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader.<sup>33</sup> Application of rules concerning digital content and digital service on contracts where the trader supplies, or undertakes to supply, digital content or a digital

29 According to the opinion of interest groups which is not publicly available.

30 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

31 Judgment of the Court (Grand Chamber) of 1 October 2019 no. C-673/17 (Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH) 65.

32 The question is raised by K. Sein and P. Kalamees in their opinion concerning the transposition of the DCD. Opinion is not publicly available.

33 Recital 24 of the DCD.

service to the consumer, and the consumer provides, or undertakes to provide, personal data can be found in the § 62<sup>4</sup>(2) of the draft law. According to the Art. 3(8) of the DCD, European Union law on the protection of personal data shall apply to any personal data processed in connection with contracts for supply of digital content or digital service without prejudice to Regulation (EU) 2016/679 (hereinafter: GDPR)<sup>34</sup> and Directive 2002/58/EC<sup>35</sup>. In the event of conflict between the provisions of the DCD and Union law on the protection of personal data, the latter prevails.<sup>36</sup> The use of personal data for commercial purposes under the contract for supply of digital content or digital service in the vast majority of cases based on the consumer's consent (Art. 6(1)(a) GDPR). If personal data is needed only for the performance of the contract (e.g., e-mail address, password, etc.), the legal basis for processing the data follows from the Art. 6(1)(b) of the GDPR.

- 14 The transposition of the Directive must therefore take into account the law in force, i.e., whether to regard contracts for the supply of digital content or digital service as contracts for payment subject to the use of personal data, or whether it is necessary to lay down a specific rule. Contracts where digital content or digital services are supplied for personal data as counter-performance can be qualified under Estonian law as contracts for payment. However, it does not mean that the obligations of the parties to the contract are reciprocal,<sup>37</sup> e.g., a trader has no right to claim consent or require the transfer of personal data.
- 15 Under Art. 7(3) of the GDPR, the consumer has the right to withdraw his or her consent to the processing of their personal data at any time. Member States are free to regulate consequences of the withdrawal of the consent for the processing of the consumer's

personal data.<sup>38</sup> Estonia did not use this possibility in the draft as existing rules provide a fair solution of the situation and ensure the rights and protection of the consumer provided by the GDPR.<sup>39</sup> However, this choice is still open to discussion: do we need special provisions concerning the consequences of the withdrawal of the consent to process personal data? A situation where a consumer withdraws his or her consent to the processing of personal data may in certain cases be considered a good reason to terminate the contract (*ex nunc*) within the meaning of § 196 (2) of the LOA.<sup>40</sup> Under § 196(2) of the LOA, a good reason is a situation where the terminating party cannot, taking into account all the circumstances and the mutual interest, reasonably be required to continue the contract until the agreed date or the expiry of the notice period. Since the withdrawal of consent must be free according to the GDPR, i.e., without any sanctions, the withdrawal of consent cannot constitute a breach of contract (§ 196(3) LOA). Also, a trader may for the same reason and under § 196(2) of the LOA terminate the contract, for example restrict the access to social media services or to the app. Paragraph 196 of the LOA applies in cases, where the digital content has already been transferred and also if the digital service continues to be provided.

- 16 Under Art. 17(1)(b) GDPR, the consumer is entitled to require the erasure of the personal data when he or she has withdrawn the consent or objects to the processing of personal data. It is not clear, if special rules concerning the right to require the erasure of the personal data are needed. According to the § 195(2) of the LOA termination (*ex nunc*) the contract shall release both parties from the performance of their contractual obligations. Upon termination (*ex nunc*) of a contract, the parties are only required to return that which has been delivered in advance with respect to the time of cancellation of the contract and rules on termination *ex tunc* apply *mutatis mutandis* (§ 195(5) LOA). This leads to the conclusion that withdrawal of the consent to process personal data is to be understood as termination of the contract and general rules concerning the obligations of

34 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

35 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201.

36 Art. 3(8) of the DCD.

37 I. Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) NJW 72, 1706.

38 Recital 40 of the DCD. See more on discussion concerning the right to withdraw the consent in C. Langhanke, M. Schmidt-Kessel, 'Consumer Data as Consideration' (2015) EuCML 6, 218-23.

39 About the consequences of the withdrawal of the consent under Estonian law see more in cf Kull (n 13).

40 According to the § 62<sup>3</sup> of the draft law, general part of the LOA applies if otherwise is not provided. Rules on right to terminate contract *ex nunc* are provided for in the general part of the LOA.

the trader under GDPR apply (§ 62<sup>15</sup> draft law).<sup>41</sup> There were no special regulation concerning the consequences of the withdrawal of the consent to process personal data in the pre-draft law. The draft law provides for the contractual consequences of the withdrawal of the consumer's consent to the processing of personal data, which ensures clarity for the consumer and excludes the possibility that the withdrawal could be considered as a breach of contract. According to the § 62<sup>18</sup>(1) of the draft law, if a consumer exercises the right to withdraw his or her consent to the processing of personal data, trader may rely on the provisions of § 196(1) of the LOA in the case of a contract which provides for the continuous or multiple supply of digital content or digital services. In addition, withdrawal of the consumer's consent to the processing of personal data shall not be considered a breach of contract and the trader shall not be able to seek redress against the consumer as a result (§ 62<sup>18</sup>(2) draft law).

- 17 A consumer can withdraw his or her consent to the processing of personal data by declaration of intention in any form unless otherwise prescribed by law according to the § 68 of the GPCCA. This also must be the general rule in contracts for supply of digital content or service. However, the general rule concerning the time limit for termination of the contract provided for in the § 118 and § 196(3) of the LOA shall not apply on contracts for the supply of digital content or digital service<sup>42</sup> and will be provided as special rule in the draft law.

### III. Period of liability for lack of conformity

- 18 Recital 56 of the DCD clarifies that to “ensure legal certainty” traders and consumers must always be able to rely on a time limit, which may be either a time limit for the trader's liability or a time limit for the consumer to exercise his or her rights. It is also possible to set both deadlines.<sup>43</sup> At the moment, Estonian draft law provides both the time limit for trader's liability and limitation period. A trader shall be liable for any lack of conformity which exists at the time of supply (Art. 10(2) DCD)<sup>44</sup> and becomes

apparent within a period of time after supply which shall not be less than two years (Art. 11(2) DCD). Also, the Sale of Goods Directive provides that the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time (Art. 10(1) Sale of Goods Directive).<sup>45</sup> Member States may maintain or introduce longer time limits than those in DCD (Art. 11(3) and Sale of Goods Directive (Art. 10(3)) on the condition that limitation period allows to the consumer exercise the remedies for any lack of conformity, which occurs or becomes apparent during at least 2 years period after supply or delivery. Since one-off digital content supply can be qualified primarily as either a sales or contract for work within the meaning of Estonian law, it would be reasonable to reconcile the limitation periods with limitation period applicable to the supply of digital content or digital service.

- 19 Therefore, the following solutions were under discussion: 1) maintain the time limit of the trader's liability for 2 years as it is in the current law and, in addition, apply the limitation period; 2) waive the 2-years' time limit of the trader's liability and apply only the limitation rules.
- 20 The first solution would not significantly change the existing law and at the same time is in line with the DCD. In particular, under Estonian law the seller is liable for any lack of conformity of a thing which becomes apparent within two years as of the date of delivery of the thing (§ 218(2) LOA) only in consumer sale.<sup>46</sup> There is no time limit on trader's liability in other sales contracts. In essence, this creates the possibility that the rights of consumers are less protected in terms of the trader's liability than the rights of other buyers. This rule was transposed into Estonian law from the Art. 5(1) of the Consumer Sales Directive<sup>47</sup> under which seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods. The second sentence of the same article provides the possibility that if, under national legislation, the right to use remedies are subject to a limitation period, that period shall not expire within two years from the time of delivery.

41 See also Kull (n 39) 49.

42 It would be against the principle provided for in the Art. 15 of the DCD.

43 See also G. Spindler and K. Sein, 'Die Richtlinie über Verträge über digitale Inhalte, Gewährleistungen, Haftung und Änderungen' (2019) *MultiMedia und Recht*, 492.

44 The same rule applies to both B2C and B2B sales contracts under § 218(1) of the LOA and contract for work under §

642(1) of the LOA.

45 The same rule applies to sales contract under § 218(2) of the LOA and contract for work under § 642(2) of the LOA.

46 About the seller's liability under Estonian law, see \*\*there's no reference here\*\*

47 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. *OJ L 171*.



Estonia did not use the possibility to establish more favourable rules for consumers. At the same time, the general three-year rules on limitation periods according to the § 146(1) of the GPCCA apply also to consumer sales. Under the DCD, Member States should remain free to regulate national limitation periods including the starting point of limitation period.<sup>48</sup> In any case the regulation of starting points should allow consumers to exercise their remedies for any lack of conformity that becomes apparent at least during the period during which the trader is liable for a lack of conformity. As general rule, the limitation period of a claim begins when the claim falls due unless otherwise provided by law (§ 147(1) GPCCA). Beginning of expiry of claims arising from lack of conformity of purchased thing is governed by a special provision, namely § 227 of the LOA. Under § 227 of the LOA, the limitation period of a claim arising from the lack of conformity of a thing begins as of the delivery of the thing to the buyer. The same applies to the delivery of a substitute thing by the seller. Upon repair of a thing by the seller, the limitation period of claims against the eliminated deficiency begins anew as of the repair of the thing. The length and starting point of the limitation period laid down for contracts for work do not differ from the limitation periods for claims arising from the contract of sale.<sup>49</sup>

- 21 Under existing rules, consumers can claim damages or use other remedies during 3-years' time limit from the delivery of digital content if non-conformity becomes apparent within 2 years as of the date of supply which mean that parties have to pay separate attention to both the time limit and limitation period (which might be the downside of the solution). Despite this, draft law offers a solution which is based on both the limit of liability of the trader and limitation period.<sup>50</sup>

48 Recital 58 of the DCD; recital 42 of the Sale of Goods Directive.

49 According to the § 651(1) of the LOA regulating start of the limitation period in contracts for work, the limitation period of a claim arising from the lack of conformity of work shall start as of the completion of the work. If the customer is required to accept the work, the limitation period of a claim shall start as of the acceptance of the work or as of the work being deemed to have been accepted. § 651(2) of the LOA: Upon the performance of substitute work, the limitation period shall commence as of the completion of the substitute work. Upon remedying a lack of conformity, the limitation period shall recommence with respect to the remedied lack of conformity as of the remedying of the lack of conformity

50 LOA § 62<sup>10</sup> Liability of the trader for non-conformity of the digital content or digital service. (1) Where the contract provides for the supply of digital content or service in one

- 22 The second solution means that the time limit for the trader's liability will be repealed and limitation period of 3-years will be the only time limit for trader's liability. As a result, the consumer might be in a better position as the time limit for seeking remedies will be in essence extended (no additional 2-year time limit)<sup>51</sup> while general limitation period of 3-years would apply to all one-off contracts for supply of digital content or digital service regardless of the qualification of the contract under applicable law.<sup>52</sup> However, a number of stakeholders also expressed the view that replacing the current 2-year limitation of trader's liability with a general 3-year limitation period would lead traders into a more difficult position, as already a period of 2-years is too long to prove non-conformity of certain types of goods at the time of delivery. For example, in cases of video games, improvements are made on an ongoing basis which makes it difficult to identify the cause of the problem if time limit is too long. This might be a downside of the solution for traders.

- 23 In case of a continuous supply of digital services (e.g. Dropbox, Netflix), the trader shall be liable for a lack of conformity (Art.-s 7, 8 and 9 DCD), that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.<sup>53</sup> If, under national law, the rights concerning the use of remedies are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies for any lack of conformity that occurs or becomes apparent during the period of time referred to in the first subparagraph.<sup>54</sup> A contract for continuous supply of digital content or digital service might be also qualified as contract for work. In that case, for example if the cloud service or use of software is provided, the delivery of the respective partial performance will take place in the form of continuous transfer. According to the §

or more separate operations, the trader shall be liable for non-conformity of the digital content or service which exists at the time of supply of digital content or service and which becomes apparent within two years as of the date of delivery [...].

51 In the case of a waiver of the time limit on trader's liability, the Estonian legislature would follow the example of BGB, where there is no time limit on the seller's liability. See BGB § 438.

52 In most cases, one-off contracts for supply of digital content or digital services will be qualified as sales contracts (§ 208 LOA) or contracts for work (§ 635 LOA).

53 Art. 11(3) of the DCD.

54 Art. 11(3) of the DCD.

651 of the LOA, the limitation period starts from the completion of the work, or if the customer is required to accept the work, the limitation period of a claim shall start as of the acceptance of the work or as of the work being deemed to have been accepted. It does mean that if supply of digital content or service is continuous; the limitation period starts from the moment the defect occurs (work was completed, accepted or deemed to be accepted), and consumer shall be able to use remedies concerning the defects occurred during whole period of the contract. In that case the requirement of the DCD Art. 11(3) is met, and the limitation period allows the consumer to exercise the remedies for any lack of conformity that occurs or becomes apparent during the contractual relations (and even after the end of the contract).

- 24 The situation where a contract is qualified as lease contract (for example, use of CD with digital content) seems problematic. Under the lease contract, a lessor is required to deliver a thing, together with its accessories, to a lessee by the agreed time and in a suitable condition for contractual use and to ensure that the thing is maintained in such condition during the validity of the contract (§ 276(1) LOA). The limitation period of the claims of a lessee shall start as of the end of the contract under the § 338 of the LOA. According to the § 338 of the LOA, the limitation period of a claim by a lessor for compensation for alteration or deterioration of a leased thing and a claim by a lessee for compensation for expenses incurred in relation to a thing or for removal of alterations is six months of the return of the thing. The limitation period of the claims of a lessee shall start as of the termination of the contract and of a claim of a lessor for compensation for alteration or deterioration of a leased thing shall expire together with a claim for the return of the thing. This means that the 6-month limitation period has to be changed. The start of the limitation period from the termination of the contract seems to be in accordance with the requirements of the DCD. If the contract is qualified as a contract of mandate (§ 619 LOA), general rules on the limitation period and start of that period from GPCCA (§ 147) shall apply. In conclusion, finding the proper moment when the limitation period shall start is the main challenge. If the starting point were the time of the occurrence of the defect (§ 147(2) GPCCA), the liability of the trader for all defects occurring during the contract would be guaranteed, as required by the Directive. A 3-year limitation period would preclude a disproportionately long time for the trader to pursue claims against him,<sup>55</sup> while ensuring that the consumer still has a reasonable opportunity

to enforce his or her claims.<sup>56</sup> In any case, the relationship between general and specific limitation rules has to be analysed thoroughly.

## E. Concluding remarks

- 25 At the time of writing, Estonia does have the final publicly available draft law of the transposition of the DCD and Sale of Goods Directive. A number of important decisions concerning the transposition of directives have been taken. Following the Estonian legislative tradition, the Digital Content Directive will be implemented into the Law of Obligation Act, in the Part 1 as new Division 6 in Chapter 2 (Contracts). This seems to be the most reasonable choice, consistent with transposition traditions already established in previous practice. The DCD, Sale of Goods Directive and Modernization Directive to be transposed fall within the scope of regulation of the LOA and partly also of the GPCCA which means that changes will also be made in other parts of the respective legal acts. Estonia did not use the opportunity to extend the application of the rules of the DCD to contracts that are excluded from the scope of the Directive, such as such as non-governmental organisations, start-ups or SMEs. The draft does not provide any rules concerning the dual-purpose contracts. However, it can be argued that unless the application to dual-use contracts is not expressly provided for in the law, memorandum should include an explanation to that effect.
- 26 In the draft, Estonia did not use the freedom to determine the legal nature of contracts for the supply of digital content or a digital service, e.g., whether such contracts constitute a sale, service, rental or sui generis contract. The Special Division in the general part of the LOA will apply to all types of contracts if they meet the characteristics of a contract for the supply of digital content or a digital service provided by law.
- 27 The DCD does not apply to situations where the trader only collects metadata, such as information concerning the consumer's device or browsing history, except where this situation is considered to be a contract under national law. Estonia did not use the freedom to extend the application of rules concerning the supply of digital content or service to such situations. Draft law regulates contractual consequences of the withdrawal of the consent for the processing of the consumer's personal data in order to ensure compliance with the requirement of the GDPR. This is an important provision, the aim of

55 See critical opinion concerning the Directive's liberal approach towards the proposed freedom of the Member States to choose the time limit for liability and limitation period in Spindler (n 25) 213.

56 About the time limits of the trader's liability and limitation period in the DCD and Estonian law see Urgas, Koll (n 13) 563.

which is not so much to regulate the consequences but to explain law simply and clearly. As Member States are free to apply either a time limit for the trader's liability or a time limit for the consumer to exercise his or her rights, Estonian draft law provides both a time limit for trader's liability and a limitation period. This means that the time limit of the trader's liability for 2 years, as it is in the current law, is maintained and in addition, the limitation period of 3 years will apply. In conclusion, for Estonia, the transposition of the DCD does not lead to very significant changes in the current private law system and only some discretionary possibilities left to the Member States have been used. Finally, in general the choices made in the draft have so far been justified.